WRP ASIA PACIFIC SDN BHD

v.

TENAGA NASIONAL BHD & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
LOW HOP BING JCA
ABDUL WAHAB PATAIL JCA
CLEMENT SKINNER JCA
[CIVIL APPEAL NOS: W-02-647-2010 & W-02-649-2010]
28 FEBRUARY 2011

ADMINISTRATIVE LAW: *Remedies - Judicial review - Leave - Decision of Tenaga Nasional Berhad (TNB) issued pursuant to s. 38(1) Electricity Supply Act 1990 - Whether TNB a "public authority" as stipulated in O. 53 r. 2(4) Rules of the High Court 1980 for purposes of obtaining leave for judicial review - Ambit of s. 38(1) Electricity Supply Act 1990 - Whether application correctly dismissed at leave stage*

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PUBLIC AUTHORITIES: *Remedies - Judicial review - Leave - Decision of Tenaga Nasional Berhad (TNB) issued pursuant to s. 38(1) Electricity Supply Act 1990 - Whether TNB a "public authority" as stipulated in O. 53 r. 2(4) Rules of the High Court 1980 for purposes of obtaining leave for judicial review - Ambit of s. 38(1) Electricity Supply Act 1990 - Whether application correctly dismissed at leave stage*

PUBLIC UTILITIES: *Electricity - Notice to disconnect electricity supply - Judicial review - Leave - Decision of Tenaga Nasional Berhad (TNB) issued pursuant to s. 38(1) Electricity Supply Act 1990 - Whether TNB a "public authority" as stipulated in O. 53 r. 2(4) Rules of the High Court 1980 for purposes of obtaining leave for judicial review - Ambit of s. 38(1) Electricity Supply Act 1990 - Whether application correctly dismissed at leave stage*

The appellant/consumer filed an application under O. 53 Rules of the High Court 1980 ('RHC') for judicial review to quash the decision of Tenaga Nasional Berhad ('TNB') contained in TNB's letter, a Notice in Form A and a bill for RM5,485,463.87 ('TNB's documents') issued pursuant to s. 38(1) Electricity Supply Act 1990 ('ESA'). TNB's documents stated, *inter alia*, that an inspection carried out in the Meter Room of the consumer's factory premises revealed strong evidence of tampering with the meter located therein, which resulted in an inaccurate reading of the electrical usage leading to a billing undercharge of RM5,485,463.87. The consumer was further notified that the electricity supply would be discontinued if the amount was not paid within 14 days from the date thereof. The High Court judge dismissed the consumer's application at the leave stage, resulting in the present appeals in which the following question required determination: Whether TNB, in issuing TNB's documents under s. 38(1) ESA, was a "public authority" as stipulated in O. 53 r. 2(4) RHC for the purposes of obtaining leave for judicial review.

Held (dismissing both appeals with costs)

Per Low Hop Bing JCA delivering the judgment of the court:

(1) Applications which may be made under O. 53 r. 2(4) RHC are necessarily applications which seek to invoke public law in order to obtain an order for judicial review against a public authority. Order 53 r. 2(4) RHC does not contemplate any review of a private individual, entity or body. It is, therefore, essential that there exists a distinctive public element before judicial review can be invoked. In the instant appeals, the relationship between the consumer and TNB was commercial or contractual, and came within an environment regulated by private law. Thus, the consumer could not challenge TNB pursuant to O. 53 r. 2(4) RHC by way of judicial review. *Bursa Malaysia Securities Bhd v. Gan Boon Aun* (foll); *Tenaga Nasional Bhd v. Tekali Prospecting Sdn Bhd* (foll). (paras 14 & 17)

(2) Section 38(1) ESA provides specifically for the preservation of TNB's interests and empowers TNB to act expeditiously, thereby preventing misuses such as the theft of electricity supplied by TNB. Legislature did not intend that an offence be proven in court before s. 38(1) ESA can be invoked as

any review would defeat swift enforcement under the ESA, where the supply of electricity needs to be severed immediately to avoid further illegal usage by the perpetrator. *Claybricks & Tiles Sdn Bhd lwn. Tenaga Nasional Bhd* (foll). (paras 19 & 20)

(3) In light of the foregoing grounds, the High Court judge was correct in dismissing the consumer's application at the leave stage. (para 21)

Bahasa Malaysia *Translation Of Headnotes*

Perayu/pengguna memfailkan permohonan di bawah A. 53 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') bagi mendapatkan semakan kehakiman untuk membatalkan keputusan Tenaga Nasional Berhad ('TNB') yang dikandungi dalam surat TNB, Notis dalam Borang A dan bil bagi RM5,485,463.87 ('dokumen-dokumen TNB') yang dikeluarkan menurut s. 38(1) Akta Bekalan Elektrik 1990 ('ABE'). Dokumen-dokumen TNB menyatakan, antara lain, bahawa suatu penyiasatan yang dijalankan di Bilik Meter kilang pengguna mendedahkan keterangan kukuh bahawa meter yang ditempatkan dalamnya telah diusik, mengakibatkan suatu bacaan yang tidak tepat mengenai penggunaan elektrik yang membawa kepada bayaran kurang dalam bil sebanyak RM5,485,463.87. Pengguna juga diberitahu bahawa bekalan elektrik akan dipotong jika amaun tersebut tidak dibayar dalam masa 14 hari dari tarikh itu. Hakim Mahkamah Tinggi menolak permohonan pengguna di peringkat kebenaran, menyebabkan rayuan-rayuan semasa di mana soalan yang berikut perlu ditentukan: Sama ada TNB, dalam mengeluarkan dokumen-dokumen TNB di bawah s. 38(1) ABE, adalah suatu "pihak berkuasa awam" seperti yang dinyatakan di dalam A. 53 k. 2(4) KMT bagi tujuan mendapatkan kebenaran bagi semakan kehakiman.

Diputuskan (menolak kedua-dua rayuan dengan kos)
Oleh Low Hop Bing HMR menyampaikan penghakiman mahkamah:

(1) Permohonan-permohonan yang boleh dibuat di bawah A. 53 k. 2(4) KMT adalah semestinya permohonan-permohonan yang cuba menggunakan undang-undang awam untuk mendapatkan suatu perintah semakan kehakiman terhadap suatu pihak berkuasa awam. Aturan 53 k. 2(4) KMT tidak menimbangkan

apa-apa semakan sesuatu individu, entiti atau badan persendirian. Ia, oleh itu, sangat perlu bagi wujudnya suatu unsur awam tersendiri sebelum semakan kehakiman dapat digunakan. Di dalam rayuan-rayuan semasa, perhubungan di antara pengguna dan TNB adalah komersial atau kontraktual, dan termasuk dalam keadaan yang dikawal oleh undang-undang persendirian. Oleh yang demikian, pengguna tidak boleh mencabar TNB menurut A. 53 k. 2(4) KMT melalui semakan kehakiman. *Bursa Malaysia Securities Bhd v. Gan Boon Aun* (diikuti); *Tenaga Nasional Bhd v. Tekali Prospecting Sdn Bhd* (diikuti).

(2) Seksyen 38(1) ABE menyediakan secara khusus bagi kepentingan TNB dikekalkan dan memberi kuasa kepada TNB untuk bertindak dengan segera, dan dengan itu mengelak dari penyalahgunaan seperti kecurian elektrik yang dibekalkan oleh TNB. Badan perundangan tidak berniat bagi kesalahan dibuktikan di mahkamah sebelum s. 38(1) ABE boleh digunakan kerana apa-apa semakan akan menghalang penguatkuasaan segera di bawah ABE, di mana bekalan elektrik perlu dipotong dengan serta-merta untuk mengelak dari penggunaan menyalahi undang-undang lanjutan oleh pesalah. *Claybricks & Tiles Sdn Bhd lwn. Tenaga Nasional Bhd* (diikuti).

(3) Memandangkan alasan-alasan yang diberikan, hakim Mahkamah Tinggi bertindak betul apabila menolak permohonan pengguna di peringkat kebenaran.

Case(s) referred to:

Bursa Malaysia Securities Bhd v. Gan Boon Aun [2009] 5 CLJ 698 CA ***(foll)***

Chin Mee Keong & Ors v. Pesuruhjaya Sukan [2007] 5 CLJ 363 CA ***(refd)***

Claybricks & Tiles Sdn Bhd lwn. Tenaga Nasional Bhd [2006] 4 CLJ 892 CA ***(foll)***

Dai-Ichi Electronics (M) Sdn Bhd lwn. Tenaga Nasional Berhad [1996] 1 LNS 47 HC ***(refd)***

George John v. Goh Eng Wah Bros Film Sdn Bhd & 2 Ors [1987] 1 LNS 111 HC ***(refd)***

Mohd Nordin Johan v. The Attorney-General, Malaysia [1983] 1 CLJ 130; [1983] CLJ (Rep) 271 FC ***(refd)***

OSK & Partners Sdn Bhd v. Tengku Noone Aziz Tengku Mahmood & Anor [1983] 1 CLJ 288; [1983] CLJ (Rep) 317 FC ***(refd)***

Tan Yeong Kim lwn. Tenaga Nasional Berhad [2000] 8 CLJ 629 HC ***(refd)***

Tenaga Nasional Bhd v. Tekali Prospecting Sdn Bhd [2002] 3 CLJ 624 CA ***(foll)***

Legislation referred to:
Electricity Supply Act 1990, ss. 11(4), 37(1), (3), (14), 38(1)
Rules of the High Court 1980, O. 53 rr. 2(4), 3

For the appellant - Robert Low (Tam Chong Lii with him); M/s Ranjit Ooi & Robert Low
For the respondent - Nadia Hanim (Shamsul Bol Hassan with him) SFCs

[Appeal from High Court, Kuala Lumpur; Judicial Review Nos: R1(4)-25-28-2010 & R1(4)-25-24-2010]

Reported by Suresh Nathan

JUDGMENT

Low Hop Bing JCA:

Appeal

[1] The appeals herein *viz* W-02-647-2010 and W-02-649-2010 involve the same parties and facts. They were filed by the same appellant ("the consumer") against the decision of the learned High Court Judge who on 25 February 2010 dismissed the consumer's application for leave, with costs to the Attorney General. On 17 December 2010, we dismissed both the appeals and affirmed the decision of the High Court. We now give our grounds.

Factual Background

[2] The consumer, a global gloves manufacturer and provider, had filed an application under O. 53 of the Rules of the High Court 1980 for judicial review to quash the decision of Tenaga Nasional Berhad (TNB) (a public company limited by shares) contained in TNB's letter, notice in Form A and bill No. 2197471 for RM5,485,463.87 (collectively, "TNB's documents") issued pursuant to s. 38(1) of the Electricity Supply Act 1990. (A reference hereinafter to an order and a rule is a reference to that order and rule in the Rules of the High Court 1980, while a reference to a section is a reference to that section in the Electricity Supply Act 1990).

[3] TNB's documents stated, *inter alia*, that an inspection was carried out on 13 November 2009 at the Meter Room in the consumer's factory premises and found "bukti yang kukuh" (strong evidence) that the meter located therein was tampered with and, as a result, there was inaccuracy in relation to the reading of the electrical usage leading to a billing undercharge of RM5,485,463.87. The consumer was further notified that if the amount was not paid within 14 days from the date thereof, electricity supply would be discontinued.

[4] At the leave stage, the Attorney General appeared and opposed the consumer's application.

[5] The learned judge sustained the Attorney General's objection and dismissed the consumer's application.

Question For Determination

[6] The consumer's learned counsel Mr Robert Low (assisted by Mr Tam Chong Lii) argued, *inter alia*, for leave to be granted as TNB's decision is amenable to judicial review and the consumer has an arguable case which is not frivolous or vexatious.

[7] Acting for the Attorney General, learned senior federal counsel Ms Nadia Hanim and Mr Shamsul Bol Hassan responded, *inter alia*, that TNB which issued the documents is not a "public authority" as stipulated in O. 53 r. 2(4).

[8] The question which we are requested to answer is:

> In issuing TNB's documents under s. 38(1) of the Electricity Supply Act 1990, is TNB a "public authority" as stipulated in O. 53 r. 2(4) for the purposes of obtaining leave for judicial review?

[9] The determination of this question would call for a consideration of:

(1) the two stages under O. 53;

(2) the scope of "public authority" under O. 53 r. 2(4); and

(3) the ambit of s. 38(1).

Two Stages Of O. 53

[10] The mechanics of O. 53 is crystallized by an analysis of the two stages, namely the leave and the substantive stages, envisaged in an O. 53 application. It is only when the court grants leave at the threshold stage that the notice of motion at the substantive stage can be proceeded with.

[11] In a minority judgment in *Chin Mee Keong & Ors v. Pesuruhjaya Sukan* [2007] 5 CLJ 363 CA at pp 390 and 391, paras [56] to [59], I took the opportunity to explain as follows:

> Two Stages Under O. 53
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> [56] It is to be noted that the judicial review procedure under O. 53 provides for two stages.
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> [57] The first stage, available under O. 53 r. 3(1), necessitates the obtaining of leave, as no application for judicial review under O. 53 shall be made unless leave therefor has been granted in accordance therewith. This concerns the preliminary application under O. 53 r. 2(2) for leave to commence judicial review proceedings. Leave may be granted or refused *in limine* as the case may be. Illustrations of cases which concern the first stage in which leave has been refused *in limine* include:
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> (1) *QSR Brands Bhd v. Suruhanjaya Sekuriti & Anor* [2006] 2 CLJ 532 CA in which the Court's leave refusal in limine was affirmed by the Court of Appeal;
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> (2) *Tan Kwor Ham v. Pengurusan Danaharta Nasional Bhd* [2006] 1 CLJ 927 CA in which the Court of Appeal reversed the High Court's leave refusal *in limine* in *Tan Kwor Ham & Ors v. Pengurusan Danaharta Nasional Sdn Bhd & Ors* [2003] 7 CLJ 205 HC; and instead granted leave on appeal, but the Federal Court had on 6 July 2007 in *Pengurusan Danaharta Nasional Bhd v. Tan Kwor Ham & Ors and Another Appeal* [2007] 4 CLJ 513 affirmed the High Court's leave refusal *in limine*, thereby overruling the Court of Appeal; and
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> (3) *Ta Wu Realty Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri & Anor* [2004] 6 CLJ 398 HC, where leave was refused in limine by the High Court.
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> [58] The second stage is regulated by O. 53 r. 4(1) and (2). That concerns the substantive application for *certiorari* after leave has been granted. Authorities which revolve around the second stage include:

(1) *Government of Malaysia & Anor v. Jagdis Singh* [1987] 1 CLJ 451; [1987] CLJ (Rep) 110 SC;

(2) *Khoo Ah Imm @ Chang Bee Kiam & Ors v. Datuk Bandar Kuala Lumpur & Anor* [1997] 3 CLJ 519 CA; and

(3) *Tenaga Nasional Bhd v. Tekali Prospecting Sdn Bhd* [2002] 3 CLJ 624 CA.

[59] As the instant appeal arose from the High Court's leave refusal *in limine* at the first stage, I am of the view that only the authorities which expound on the ramifications of the first stage are directly relevant and merit consideration here. However, on the other hand, the authorities which deal with the second stage, after leave has been granted, are unlikely to be of any assistance in the determination of the instant appeal.

[12] In relation to the two stages under O. 53, in *Chin Mee Keong, supra*, a similar sentiment was shown in the separate majority judgments of James Foong JCA (now FCJ) at pp. 382 and 383 in [25] to [28] and of Suriyadi Halim Omar JCA at p. 401 in [92]. (See also *George John v. Goh Eng Wah Bros Film Sdn Bhd & 2 Ors* [1987] 1 LNS 111 per Lim Beng Choon J (as he then was); *Mohd Nordin Johan v. The Attorney-General, Malaysia* [1983] 1 CLJ 130; [1983] CLJ (Rep) 271; and *Bursa Malaysia Securities Bhd v. Gan Boon Aun* [2009] 5 CLJ 698 CA, paras [21] and [22] at pp. 715 and 712 per Heliliah Mohd Yusof JCA (as she then was)).

"Public Authority": O. 53 r. 2(4)

[13] Leave to commence judicial review is only granted against a public authority. In this regard, O. 53 r. 2(4) merits reproduction as follows:

> Any person who is adversely affected by the decision of any **public authority** shall be entitled to make the application. (emphasis added)

[14] The applications which may be made under O. 53 r. 2(4) are necessarily applications which seek to invoke public law in order to obtain an order for judicial review against a public authority. Order. 53 r. 2(4) does not contemplate any judicial review of a private individual, entity or body. Therefore, it is essential that there exists a distinctive public element before judicial review jurisdiction can be invoked. Hence, judicial review

applies only to a public authority exercising an element of public flavour and not wholly a contractual one: per Abdoolcader J (later SCJ) in *OSK & Partners Sdn Bhd v. Tengku Noone Aziz Tengku Mahmood & Anor* [1983] 1 CLJ 288; [1983] CLJ (Rep) 317, as applied by Gopal Sri Ram JCA (later FCJ) in *Tenaga Nasional Bhd v. Tekali Prospecting Sdn Bhd* [2002] 3 CLJ 624 [IAR/Tab 8].

[15] In *Bursa Malaysia Securities Bhd v. Gan Boon Aun* [2009] 5 CLJ 698 CA, under the Capital Markets and Services Act 2007, Bursa Malaysia is a stock exchange (the precursor being the Kuala Lumpur Stock Exchange) vested with statutory functions to ensure orderly and fair market in the securities that are traded through its facilities. The respondent was a non-independent executive director cum Chief Executive Officer of Transmile Group Bhd (Transmile), a company listed on Bursa Malaysia's Official List. On 24 May 2007, Bursa Malaysia issued to the respondent a notice to show cause why he should not be penalized for breaching its Listing Requirements in respect of a delay in the submission of Transmile's audited account for the year 2006 on 10 July 2007. Bursa Malaysia also issued a second notice. On 12 July 2007, the Securities Commission charged the respondent with an offence under the Securities Industry Act 1983. The respondent wrote to Bursa Malaysia asking for the enforcement action to be deferred sine die pending the criminal trial on grounds of *sub judice*. Bursa Malaysia refused. The respondent applied at the threshold stage under O. 53 r. 3 for leave to *inter alia* commence judicial review. The High Court allowed the respondent's application. Bursa Malaysia appealed against the granting of leave to commence judicial review. This court, speaking through Heliliah Mohd Yusof JCA (later FCJ), allowed Bursa Malaysia's appeal and held *inter alia* that Bursa Malaysia is a commercial entity vested with regulatory measures in the capital market.

[16] In *Tekali Prospecting Sdn Bhd, supra*, TNB had issued a notice under s. 11 to the respondent (the land owner) whose land was required for purposes of constructing pylons carrying high tension wires. In accordance with s. 11(4), the respondent lodged its objections to the notice. The respondent sought judicial review to quash the s. 11 notice which the learned High Court Judge allowed. This court allowed the appeal and held, *inter alia*, that, on the facts, TNB's position is not significantly different compared with that of the (then) Kuala Lumpur Stock Exchange so as to exempt it from judicial review.

A **[17]** Reverting to the instant appeal, we find that the facts do not attract the application of O. 53 which is intended to cover the domain of public law. The relationship between the consumer and TNB is commercial or contractual. It comes within an environment regulated by private law. There is no distinct public
B element to include the relationship between the consumer and TNB in the domain of a public law and public authority. It is thus not open to the consumer to challenge TNB pursuant to O. 53 r. 2(4) by way of judicial review which is a public law remedy.

C **Ambit Of s. 38(1)**

[18] We must now consider the ambit of s. 38(1). It is singularly significant to note that TNB's documents were issued based on a requirement under the Electricity Supply Act 1990 for payment to be made. Section 38(1) reads as follows:
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> 38. Disconnection of supply of electricity
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> (1) Where any person employed by a licensee finds upon any premises evidence which in his opinion proves that an offence has been committed under section 37(1), 37(3) or 37(14), the licensee
E or any person duly authorized by the licensee may, upon giving not less than twenty-four hours' notice, in such form as may be prescribed, cause the supply of electricity to be disconnected from the said premises.

F **[19]** The ambit of s. 38(1) was judicially considered by this court in *Claybricks & Tiles Sdn Bhd lwn. Tenaga Nasional Bhd* [2006] 4 CLJ 892 CA. The consumer there failed to obtain an Erinford injunction to restrain TNB from disconnecting electricity supply to the consumer served with a s. 38 notice. The consumer sought
G to invoke private law remedy as opposed to judicial review. This court speaking through Zulkefli Makinudin JCA (now FCJ) held that TNB's s. 38 notice to disconnect the electricity supply for offences enumerated in s. 37 need not prove the offences in court. The reason is that any purported act to review such act
H will defeat the swift enforcement under the Act where electricity supply needs to be severed immediately to avoid further illegal usage by the perpetrator. The nature of the act taken by TNB arose from a commercial obligation on the part of the consumer rather than TNB's obligation under public law.

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[20] In *Claybricks, supra*, this court overruled the decision in *Dai-Ichi Electronics (M) Sdn Bhd lwn. Tenaga Nasional Berhad* [1996] 1 LNS 47 HC where the High Court held that the disconnection could only be effected after it has been proved in court that the consumer has committed an offence under s. 37(1), (3) or (14). Instead, this court agreed with the judgment of Alauddin Mohd Sheriff J (now PCA) in *Tan Yeong Kim lwn. Tenaga Nasional Berhad* [2000] 8 CLJ 629 HC. Zulkefli Makinudin JCA (now FCJ) elaborated that:

(1) Section 38(1) was enacted to give effective powers to TNB to instantly prevent any offence that may be committed and not to be left unattended or unabated: para [7];

(2) Section 38(1) is clear and unambiguous. It provides specifically for the preservation of TNB's interest and empowers TNB to act expeditiously, thereby preventing misuses such as theft of electricity supplied by TNB. Had the legislature intended that an offence be proved in court before s. 38(1) can be invoked, it would have expressly enacted to that effect. However, that was not to be the case.

Conclusion

[21] In the light of the foregoing grounds, we are of the view that the learned High Court Judge was correct in dismissing the consumer's application at the leave stage.

[22] That being the case, we dismissed both the appeals with total costs of RM10,000 to the Attorney General to whom the deposit is also to be paid on account of the fixed costs.